

WYOMING WATER, INC.

IBLA 80-397

Decided July 20, 1981

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting an application for a right-of-way for a reservoir.

Affirmed.

1. Rights-of-Way: Applications -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Where, over a 6-year period an applicant for a right-of-way fails to submit requested information or agree to reimburse BLM for costs incurred in processing the application, BLM has the authority to reject the application for a failure of diligence on the part of the applicant.

APPEARANCES: Jack R. Gage, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Wyoming Water, Inc., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated January 18, 1980, rejecting its application for a right-of-way for a reservoir. BLM stated that appellant's application was rejected for lack of diligence on Wyoming Water's part, in proceeding with the processing of the application.

[1] On December 20, 1973, appellant filed an application for a right-of-way for a reservoir pursuant to the Act of February 15, 1901, 31 Stat 790, 43 U.S.C. § 959 (1970). The total acreage of BLM managed Federal land that would be affected by the impoundment was originally stated as 140 acres. This was lowered, first to 78 acres and eventually to 14.2 acres. The primary use was stated to be as a municipal

water supply for the city of Gillette. By letter of July 25, 1974, appellant was notified that regulations had been proposed which would require the recovery of costs associated with the issuance of rights-of-way. This letter asked for a commitment by appellant to pay these costs, at that time estimated at \$10,000 in the absence of a need to prepare an Environmental Impact Statement (EIS).

By letter of August 6, 1974, appellant's attorney advised BLM that it questioned the authority of the Government to charge an applicant for the costs of an EIS, and declined at that time to commit Wyoming Water, Inc., to the expenditure. The letter requested that it be advised when the regulations were actually adopted. On September 20, 1974, a copy of the proposed regulations were sent to appellant. These regulations were, without relevant modification, eventually adopted. See 40 FR 17842 (April 23, 1975).

Nothing further happened until May 6, 1977, when the State Office wrote to appellant noting that they had received no communication from appellant since 1974, but were still carrying the case on its docket. The State Office requested that appellant either withdraw the application or advise it on when appellant anticipated that the case file would become active. By letter of June 13, 1977, Wyoming Water, Inc., informed the State Office that the application was still considered viable, but requested an extension of 18 months at which point they would reexamine their position. Two and a half years later, having heard nothing in the interim, BLM rejected the application for a lack of diligence by appellant in pursuing it.

On appeal, Wyoming Water, Inc., argues that BLM's action in denying its application without advance notice violated due process. It also argues that its original time estimates were predicated on various courses of action which had not eventuated. Thus, appellant argues "because of the failure of the Federal Government to legislate a viable energy policy, which was no fault of the applicant's, the lead time to plan and finance western water projects has been so materially extended that the applicant was not able to respond within the period of 18 months originally granted." It also noted that given the time constraints on BLM in processing rights-of-way, rejection of their application was unacceptable and "as a matter of policy the applicant should be left as high on the waiting list of persons seeking approval for right-of-way as possible."

With respect to appellant's first argument concerning due process, we would note that appellant has no right to a right-of-way under the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1970). The grant of a right-of-way under this Act was discretionary. William A. Lester, 2 IBLA 172 (1971). This was so even when the effect of the

denial was to prevent the use of waters on public land. See Death Valley National Monument-Appropriation of Water, 55 I.D. 371 (1935). In any event, this statute was repealed in 1976 by section 706(a) of Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793. All subsequent authorizations may proceed only under Title V of FLPMA.

FLPMA clearly represents a discretionary grant of authority to the Secretary and, we would note parenthetically, it clearly authorizes reimbursement for costs incurred in processing rights-of-way applications. See 43 U.S.C. § 1764(g) (1976). Thus, to speak of a deprivation of a property right, in this context, is erroneous.

To the extent that appellant's objection relates to procedural matters, we note that the Department, by allowing an appeal to this Board by any party aggrieved by an adverse decision of an officer of BLM, affords every such party an avenue for review of decisions affecting them before the decisions become final. This fulfills any due process procedural rights which appellant may possess.

With reference to their second argument, we are constrained to point out that, while Wyoming Water, Inc., suggests that BLM should merely have requested an update of their activities prior to rejecting their application, appellant's submissions to this Board indicate that they are no further along in their planning than they were in 1974, almost 6 years prior to the decision being appealed. We recognize that various of the problems mentioned by appellant have, indeed, contributed to the delay. Nevertheless, we also agree with BLM that failure, over a 6-year period, to submit plans beyond those originally tendered, especially when combined with a failure to agree to reimbursement of costs as required by 43 CFR 2802.1-2, clearly evidences a lack of diligence in pursuing this application.

Moreover, we feel appellant misconceives the relative advantage of an early filing. Considering the delays solely engendered by appellant, it is scarcely likely that, should appellant at some future date activate its application, BLM would accord appellant a priority higher than that given subsequently filed applications which have been diligently pursued, simply because the original application by appellant was earlier in time. Adoption of such a procedure would inevitably generate premature filings by everyone who felt that, at some time in the future, they might need a right-of-way. No valid purpose would be served in generating a flood of such premature applications. Accordingly, we affirm the rejection of this application.

Our action is, of course, without prejudice to the filing of a new application after appellant's planning and financial arrangements have been completed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski  
Administrative Judge

We concur:

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Bernard V. Parrette  
Chief Administrative Judge

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Edward W. Stuebing  
Administrative Judge